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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 874

STEPHEN SPIRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Legend: Reference to the Record designated (R a) refers to petitioner's appendix in the Court of Appeals.

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 20, 1967.

Citations to Opinions Below

The opinion of the District Court for the District of New Jersey is unreported and is printed in Appendix "A" hereto, *infra* p. 1a. At the request of the defendant, the

District Court made Findings of Fact and Conclusions of Law, which are printed in Appendix "B" hereto, *infra* p. 2a. The opinion of the Court of Appeals for the Third Circuit printed in Appendix "C" hereto, *infra* p. 10a, has not yet appeared in the reports. Order amending opinion of the Court of Appeals for the Third Circuit, is printed in Appendix "D", *infra* p. 16a.

Jurisdiction

The judgment of the Court of Appeals, affirming the conviction of the District Court, was dated and entered on August 29, 1967. On October 20, 1967, the Court of Appeals filed an order amending its opinion, but entered judgment denying a rehearing.

On November 9, 1967, petitioner made application for extension of time within which to file this petition. This was granted by order dated November 10, 1967, which extended time to and including December 4, 1967.

The Clerk of the Court of Appeals for the Third Circuit has entered an automatic stay of mandate, pending receipt of notice from the Clerk of the Supreme Court that this petition has been filed within time, in which event the mandate will continue until this Honorable Court has disposed of this case. In the meantime, the petitioner, who has been sentenced to confinement for two years in the custody of the Attorney General, has been continued on bail in the sum of $500.— on his own recognizance, by the District Court for the District of New Jersey.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

There are two questions presented, viz.:

I—Does failure or refusal to recognize the Just War Doctrine followed by an adherent of the Roman Catholic Church, whom the Hearing Officer characterized as "a sincere and devout member of the Catholic Church who is sincere in his adherence to his views", constitute religious discrimination and negate the freedom of religion guaranteed by the First Amendment and the Due Process Clause of the Fifth Amendment?

II—Was a registrant denied procedural due process in his selective service processing, when the Local Board failed to advise him that he could consult a Government Appeal Agent, who would have ten days after notice of classification by the Appeal Board, within which to request the Appeal Board for a reconsideration, but instead, the Local Board mailed him an order to report for induction within six days?

Constitutional Provisions, Statutes, Selective Service Regulations Involved

Constitution of the United States, Amendments I, V and XIV;

Statutes:

5 U. S. C. Sec. 1005(a);
28 U. S. C. 1254(1);
50 U. S. C. App. Sec. 456(j);
Sec. 460(b)(1);
Sec. 462(a);
Sec. 463(b);

Regulations:

32 C. F. R. Secs. 1604.41;
1604.71(a)(c)(d)(1)(3)(5);
1624.1(b);
1626.61(b).

The provisions of these statutes or pertinent parts thereof are set forth in Appendix "E", beginning at p. 18a *infra.*

Statement of the Case

Following a trial before the U. S. District Court, for the District of New Jersey, sitting without a jury, on a charge of failing to submit to induction, in violation of 50 U. S. C. App. Sec. 462, petitioner was convicted.

The facts which gave rise to the charge are: Having registered on December 6, 1957, with New Jersey Local Board No. 4, when he reached his 18th birthday, petitioner received a classification questionnaire about a month later which he completed and returned, without signing Series VII dealing with conscientious objection to participation in war (R 7a, 34a).

About the middle of November 1962, petitioner requested the special form for conscientious objectors (Form 150) from his Local Board which he completed and returned, and was thereupon classified I-A-O (R 9a). He appealed, seeking an I-O classification, and his file was forwarded to the New Jersey Appeal Board on January 22, 1963 (R 10a). After an F.B.I. investigation, a hearing before a Hearing Officer and other processing the Appeal Board returned the file to the Local Board on December 14, 1964 (R 10a) classifying the petitioner I-A by a vote of 3 to 0

(R 13a). On December 15, 1964 the Local Board mailed Form 110, Notice of Classification, to the petitioner, advising him of the Appeal Board's decision (R 20a). Six days later, on December 21, 1964, the Local Board mailed Form 252, Induction Order, to the petitioner, ordering him to report for induction on January 6, 1965 (R 14a, 22a).*

At the appointed time and place, petitioner appeared at the induction center but refused to take the one step forward which would have marked his entry into the U. S. Army (R 68a).

Throughout his selective service processing, and at the trial petitioner explained his religious training as a member of the Catholic faith and amplified his religious beliefs.

The Roman Catholic Church has a traditional teaching, derived originally from St. Augustine, developed by St. Thomas Aquinas, and later doctrines. This teaching is passed down by priests of the Church as a holy covenant from generation to generation, is discussed by theologians, but is never officially promulgated in an official statement of Pope or Council, for the Church, the Institutional Church very rarely takes a position on war (R 37a-41a; 60a-62a).**

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* Following receipt of induction order and on December 24, 1964, the Local Board received a request from petitioner for a student deferment in that he was accepted as a night student at Fairleigh-Dickinson University at Teaneck, N. J., together with college verification (R 15a). This deferment was denied by letter dated December 28, 1964, inasmuch as petitioner was not a full time student at the time the induction order was mailed (R 15a).

Application by the registrant to the New Jersey State Director of Selective Service on December 29, 1964 for a postponement of his induction order to enable him to process a Presidential appeal, met with a similar rebuff, though the Rev. Herbert Rogers, Assistant Professor of Theology at Fordham University joined in this request (R 16a, 17a).

** During his trial, petitioner sought to introduce into evidence the "Pastoral Constitution on the Church in the Modern World",

The ethics textbooks list seven requirements which must be simultaneously verified before a war may be considered just and licit for Christian participation (R 35a). These requirements are (R 35a, 36a):

1. The war must be a last resort when all other means of settling the dispute have failed.

2. The war must be declared and conducted by legitimate authority. The ordinary usage of any government will suffice.

3. There must be a reasonable assurance of a successful outcome.

4. There must be a just cause for the war.

5. There must be a proportionality in which the good effects outweigh the evil. This must apply not only to the war as a whole but to any operation within the war.

6. There must be only the use of the legitimate means of warfare.

7. There must be a right intention on the part of those responsible for conducting and declaring the war, right intention being defined as the will to peace.

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promulgated by His Holiness Pope Paul the Sixth on December 7, 1965, which was the official statement of the Church on the Fostering of Peace, the Promotion of a Community of Nations, and the Avoidance of War, but the Government objected to it because it was not considered and in fact was not in existence during the selective service processing of the petitioner. The objection was sustained. It was marked Defendant's Exhibit No. 2 for Identification (R 44a-47a).

Moreover, there are prohibitions regarding activities which would make a war unjust and consequently, illicit for Christian participation. Primarily, the prohibitions apply to direct attacks upon civilians. A civilian is considered in the eyes of the Church innocent. One does not have the right to directly take the life of an innocent person. Consequently, any military activity directed at an innocent person is sinful (R 36a).

At his trial, petitioner testified that, these criteria considered, there has never been a just war throughout history, and it is unlikely that any future war would be just (R 58a, 59a, 62a-65a).

Petitioner submitted no fewer than 23 documents, which are in his selective service file, comprising letters or published articles written by himself, as well as letters, certificates or affidavits from eminent Catholics, holding responsible positions, who have known him and who have discussed this conscientious objector outlook with him. Some of them admitted that they differed radically with his views, but have nonetheless attested to the sincerity and depth of his religious convictions.

Petitioner had attended Catholic elementary schools and a Catholic military high school, where he received religious and secular training. There, no teaching had been given with respect to war or peace (R 72a, 73a). He had attended the University of Chicago, "on and off from 1957 to 1964", dropping out periodically to earn some money and then returning (R 51a).

During one of his drop-out periods on March 13, 1962, he was reclassified I-A by the Local Board (R 53a). Then in April 1962, he took an Air Force qualifying examination;

and in July or August of that year, he applied at Lakeview or Glenview Air Station in Illinois for preprocessing for the Naval Air Reserve (R 54a). However, he told these Services to hold his application as he might be going back to school in the Fall of 1962, in which case he would not enter the Service (R 54a, 55a).

Prior to the Fall of 1962, the petitioner had had no acquaintance with the Just War Doctrine, as it was not usually taught at the high school level (R 56a).

His development as a conscientious objector can best be explained in the words of the petitioner himself, and we quote (R 55a):

> "Around October or November of 1962, I was working in the Student Peace Union, National Office in Chicago, and New Directions, paper books sent a book called 'Breakthrough to Peace', edited by Merton, a Trappist Monk. It was to be reviewed by us. I read it and it opened up new areas of thought which I never realized existed.
>
> "So I started reading further. I read 'Modern War and Basic Ethics' by John Ryan, which goes into a very elaborate discussion of the doctrine of just war. This other book, 'Morality in Modern Warfare', edited by John Nagle, which has a series of essays on the general topic of war and morality from several points of view, and I had some conversations with Prof. Gordonson of Loyola University in Chicago, who is a —perhaps the best known Catholic spokesman on pacifism.
>
> "And after discussion, reading and prayer, I realized I had no choice really than to be a conscientious objector."

As part of the processing of his selective service appeal, petitioner was noticed to appear for a hearing before William P. Reiss, a Hearing Officer, who subsequently sent a report of this hearing to T. Oscar Smith, Esq., Chief, Conscientious Objector Section of the Department of Justice. Mr. Smith in turn made a report which he submitted to the Chairman of Panel No. 1 of the New Jersey Appeal Board, in which he stated:

> "The Hearing Officer found that the registrant is a sincere and devout member of the Catholic Church and is sincere in his adherence to his views notwithstanding that he came late to his conscientious-objector position, but that the registrant does not have a conscientious objection to participation in war in any form . . . The Hearing Officer recommended that the conscientious objector claim of the registrant be not sustained."

Mr. Smith also stated:

> "The Hearing Officer reported that the registrant frankly admitted that he could not in good conscience object to participation in a 'just war'; that he also admitted that his belief that the next war would be an unjust war is a matter of opinion; that he admitted that there is no officially stated Catholic Church opinion against war; that he admitted the presence of Catholic chaplains in the Armed Forces; that he admitted that his position was based on a political analysis of warfare from an historical as well as current point of view; that he admitted that he had no objection to the use of conventional or nuclear weapons against soldiers and would have no objection to being in the Armed Forces

of the United States equipped only with guns that shot bullets provided military policy prohibited the bombing of cities having no military value." (See Appendix "F", *infra* p. 26a for the full text.)

A copy of this report and recommendation was sent to the petitioner with instructions for refutation and answer.

Within the time allotted for response, petitioner sent a letter to Panel No. 1 of the New Jersey Appeal Board, from which we quote, in part:

> "The report of the Department of Justice comments that 'he also admitted that his belief that the next war would be an unjust war is a matter of opinion.' The hearing officer did indeed ask me if I agreed with him that my belief in the unjustness of the next war was an opinion, and I did agree with him. However, upon reflecting on that statement, I feel that 'opinion' is not quite the correct word. I think that my belief in the unjustness of the next war would more appropriately be called a 'judgment', that is, an analysis or interpretation which forms the basis for action. In seeking guidance for the determination of such a judgment, I look first to the Church.
>
> "The Church, as the Church, has no official position on the application of its teachings to possible future political events. On the other hand, many theologians agree with my position, and I have in fact based my position in large measure upon the statements of these theologians. On the other hand, the presence of many priests in the armed forces indicates that there is by no means any unanimity on the question among Churchmen. The next place to seek guidance is from the gov-

ernment; but in this case, such a quest is futile—no government, no civil authority would admit to an unjust war, even if in fact it were intending to wage one such wilfully. Therefore, I am forced to rely on my own conscience, which the Church teaches must always be our ultimate and final guide. My conscience has formed a judgment, which I must accept and follow.

"Although I said that I could participate in a just war, even in a combatant status, this was purely a theoretical statement. If I had wings, I could fly. I maintain that this 'just' war is, in the real world, not capable of occurring; that as a result of the Sin of Adam and the consequent Corruption of the Human Will, it is inconceivable that a just war will ever happen—since there never has been one, as far as I can tell, and I hardly expect that Men will suddenly change. Consequently, I must refuse military service." (See Appendix "G" *infra* p. 31a for the full text of petitioner's refutation).

In making his report to the New Jersey Appeal Board, Mr. Smith made the following recommendation:

"The Department of Justice concurs in the Hearing Officer's determination and recommends to your board that the conscientious-objector claim of the registrant be not sustained and that he be not classified in Class I-O or in Class I-A-O."

The New Jersey Appeal Board followed this recommendation and classified the registrant I-A, 3 to 0. The induction order, the refusal to submit to induction and the indictment were the inevitable consequences.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner's opposition to participation in war unless seven requirements are simultaneously verified by Catholic criteria, before the war can be considered a just war, is analogous to the position of Jehovah Witnesses, who stand ready to fight in a Theocratic War and at Armageddon, but in no other war.

Having satisfied itself that the applicant is sincere in his beliefs, this Court has held in *Sicurella* v. *United States*, 348 U. S. 385 (1955) that he was entitled to exemption under Sec. 6(j) of the Universal Military Training & Service Act [50 U. S. C. App. 456(j)] despite his readiness to fight in a Theocratic War and his willingness to use force to defend his ministry, Kingdom interests and his fellow brethren.

This Court has laid down the test that it is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war; and inasmuch as history does not record any Theocratic War since Biblical times, the possibility that it can happen in the future is rather remote.

So, too, with petitioner herein. After he filed his claim as a conscientious objector, he maintained in his statements before the selective service system, that measured by Catholic criteria there never had been a Just War through-

out history and it is highly inconceivable that any future war would be just. His statement to the Hearing Officer that he would fight in a Just War was still within the context of his religious beliefs, as it presupposed that the seven criteria for a Just War would have been met.

As the petitioner has so ably stated in his letter to the Appeal Board (App. "G", p. 33a *infra*), "I maintain that this 'Just War' is, in the real world, not capable of occurring."

Nor need objections to war necessarily be objections to taking life. It is sufficient when these objections are based on Church doctrine. Neither the 1948 Act nor the 1951 Act made any reference to refusal or reluctance to take life, as a standard for conscientious objection. So long as this opposition to participation in war is predicated on religious grounds, that is all that was required. The conscientious objector provisions were intended to extend even to members of the Catholic Church adhering to the Just War doctrine.

The religious expression of what constitutes a Just War by Thomistic criteria of the Catholic Church is an ecclesiastical determination, having the force of *jure divino,* which cannot be questioned in secular tribunals. An ecclesiastical determination is binding on all governmental bodies and the Courts. *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94; *Watson* v. *Jones,* 13 Wall. 679, 727; *United States* v. *Ballard,* 322 U. S. 78, 85-88.

However, if the Court of Appeals for the Third Circuit was correct in considering that the issues in the *Sicurella* and *Spiro* cases were unrelated, then we find that:

II.

The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

There is little doubt that the outcome of numerous litigated cases* has forced the selective service system to accord conscientious objector status to those Jehovah Witnesses who will accept it and not insist on being classified as ministers.

Can the Courts permit the Selective Service System to discriminate against Catholic conscientious objectors and deny them similar status?

Time and again this Court has affirmed the importance of the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", and this prohibition has been extended to the States by the Fourteenth Amendment. *Cantwell* v. *Conn.*, 310 U. S. 296, 303 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (1943); *McCollum* v. *Board of Education*, 333 U. S. 203, 210, 211 (1948). The Courts must also include the Selective Service System in this prohibition.

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* To list just a few:

Sicurella v. *U. S.*, 348 U. S. 385 (*supra*);
Annett v. *U. S. A.*, 205 F. 2d 689 (C. A. 10th, 1953);
Kretchet v. *U. S.*, 284 F. 2d 561 (C. A. 9th, 1960);
Mayfield v. *U. S.*, 220 F. 2d 729 (C. A. 5th, 1955);
U. S. v. *Lauing*, 221 F. 2d 425 (C. A. 7th, 1955);
Shepherd v. *U. S.*, 220 F. 2d 855 (C. A. 9th, 1955);
Riles v. *U. S.*, 223 F. 2d 786 (C. A. 5th, 1955);
Hinkle v. *U. S. A.*, 216 F. 2d 8 (C. A. 9th, 1954);
Clementino v. *U. S. A.*, 216 F. 2d 10 (C. A. 9th, 1954).

In *Abington School District* v. *Schempp* (1963), 374 U. S. 203, Mr. Justice Clark expressed the views of eight members of the Court, when, in quoting from the unpublished opinion of Judge Alphonso Taft, in *Minor* v. *Board of Education of Cinc.*, he stated that the ideal of our people as to religious freedom is one of "absolute equality before the law, of all religious opinions and sects . . . " Mr. Justice Clark continues by stating that "neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Then he goes on to affirm that it is not within the power of government to invade that inviolate citadel of the individual heart and mind whether its purpose or effect be to aid or oppose, to advance or retard any religious belief. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." Can the selective service board consistently be excluded from that commitment, where a Catholic conscientious objector is involved? This is a question which must now be decided by this Court.

In *U. S.* v. *Seeger*, 380 U. S. 163, 195 (1965) the Court has stated that the very purpose of Congress in using the expression "Supreme Being" rather than some other designation was so "as to embrace *all religions*". (Italics ours.) The Catholic religion was included.

The protection of religious freedom is not restricted to any one group or any one type of religion; nor to orthodox religious practices and beliefs. *U. S.* v. *Ballard*, 322 U. S. 78; *Watson* v. *Jones*, 13 Wall. 679, 728.

It is not the business of courts to say that what is a religious practice or activity for a given group is not religion under the protection of the First Amendment. *Fowler*

v. *Rhode Island,* 348 U. S. 67, 69-70 (1951). See also *Neimotko* v. *Maryland,* 340 U. S. 268, 272 (1953).

For the Selective Service System and the Courts to accept Jehovah Witnesses, as conscientious objectors, who would fight in a Theocratic War and who would kill under certain circumstances, and to reject Catholics, as conscientious objectors, who would fight in a Just War by Thomistic criteria, is in direct violation of the Free Exercise Clause of the First Amendment. *Sherbert* v. *Werner,* 374 U. S. 398 (1963). It denies to followers of the Catholic faith the equal protection of the law, by preferring other religions over the Catholic religion, thereby running afoul of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).*

III.

The Court of Appeals has disregarded the current trend of the United States Supreme Court to erect safeguards against erosion or waiver of constitutional rights by hard-pressed defendants charged with crime.

Under the Administrative Procedures Act, 5 U. S. C. Sec. 1005 (a), Congress has provided for every party in any agency proceeding to appear in person or by or with counsel. By 50 U. S. C. App. 463 (b), the administrative processing under the selective service system was expressly removed from the application of the Administrative Procedures Act. Moreover, by authority of 50 U. S. C. App. 460 (b)(1) the President was authorized to prescribe rules and regulations for this Act. The rule was made that no

* "Discrimination may be so unjustifiable as to be violative of due process."

registrant may be represented before the local board by anyone acting as attorney or legal counsel, and this was embodied in 32 C. F. R. 1624.1(b). Thus the petitioner had no legal advice or representation at any point in his selective service processing.

Selective Service Regulation, 32 C. F. R. 1604.71 provides for the appointment of government appeal agents and associate government appeal agents, and under subdiv. (c) these government appeal agents shall, whenever possible, have legal training and experience.

After an unanimous decision by the Appeal Board, unfavorable to the registrant, the government appeal agent is empowered, under C. F. R. 1626.61(b), to request a reconsideration of the appeal board's determination, at any time within 10 days after the date when the local board mails a notice of classification to the registrant, or at any time before an induction order is mailed. Thus is a registrant given a minimal benefit of some legal advice and representation.

Notice is of the very essence of the rudimentary requirements for fair play in safeguarding property rights. *Walker* v. *Hutchinson,* 352 U. S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950). *A fortiori* does this principle apply in the case of human rights. Where the registrant does not have direct notice of the existence of the government appeal agent, or direct notice that the agent has 10 days in which to request reconsideration, the registrant cannot avail himself of this legal assistance. This irreparably prejudices his post-appeal relief, and is a step toward his ultimate conviction. When the Local Board mails him an induction order in

six days, the already restrictive minimal legal protection afforded a registrant is swept into the dustbin.

This denial of counsel to registrants during their processing was the source of great concern to Judge James D. Doyle in *U. S.* v. *Wierzchucki,* 248 F. Supp. 788 (D. C., W. D. Wisc. 1965).

In a series of landmark decisions, this Court has upheld the constitutional rights of defendants charged with crimes involving moral turpitude. If there is any waiver of constitutional rights, it is the burden of the Government to show that they have been knowingly and intelligently waived. *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Escobedo* v. *Illinois,* 378 U. S. 478 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Douglas* v. *California,* 372 U. S. 353 (1963); *Mapp* v. *Ohio,* 367 U. S. 643, 685 (1961).

In the case of a conscientious objector whose act is *malum prohibitum* and who is also hard-pressed because his religious training and belief forbid the violation of his conscience, the Government, by the adroit argument that no prejudice has been shown to the registrant by these denials of basic procedural due process, has contrived to have the conscientious objector bear the burden of proving innocence. Thus the presumption against waiver of constitutional rights and the presumption of innocence, until guilt is proven beyond a reasonable doubt, which follow some of our most hardened criminals, do not exist for the conscientious objector seeking to follow his religious training and belief. For him these presumptions have gone down the same thorny path to extinction as have lack of notice and lack of legal assistance and advice.

CONCLUSION

It is respectfully urged that this Court should grant certiorari to the Court of Appeals for the Third Circuit, to the end that the judgment below may be reversed and the petitioner may be given the I-O classification he merits.

Respectfully submitted,

ESTHER STRUM FRANKEL
Counsel for Petitioner

APPENDIX A

Opinion of the Court (R 85a)

I have listened carefully to the testimony and scrutinized the documentary evidence which has been presented to me on this case. I could jump into the philosophical, theological doctrine and religious aspects of much of the subject matter of the testimony. I do not deem it necessary to do so.

The evidence submitted by the Government in my opinion establishes beyond a reasonable doubt that the defendant is guilty of the offense charged in the indictment. Rule 23 of the Federal Rules of Criminal Procedure which covers such a trial such as the present one without a jury provides in subdivisoin C thereof that in a case tried without a jury the Court shall make a general finding and shall in addition on request find the facts special.

I have made a general finding that the defendant is guilty of the offense charged in the indictment. Unless there is a request for a special finding it is unnecessary for me to proceed further.

APPENDIX B

Findings of Fact and Conclusions of Law

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Criminal No. 93-65

UNITED STATES OF AMERICA,

Plaintiff,

—VS.—

STEPHEN SPIRO,

Defendant.

Appearances:

DAVID M. SATZ, JR., Esq.
United States Attorney

By J. NORRIS HARDING, Esq.
Asst. U. S. Attorney

FRANKEL & FRANKEL, Esqs.

By ESTHER STRUM FRANKEL, Esq.
Attorneys for Defendant

WORTENDYKE, *District Judge*:

Stephen Spiro, a resident of New Jersey, was indicted by the Grand Jury in and for this District on March 3,

1965. The indictment charged that on January 6, 1965, at Newark, in this District, Spiro, being a registrant with Selective Service Local Board No. 4 for New Jersey, and classified as I-A, and being required by law under a written order dated December 21, 1964, and transmitted to him on January 6, 1965 to appear for, and if found qualified, to submit to induction into Military Training and Service in the Armed Forces of the United States, and, the said Spiro, having appeared at the United States Army Induction Station in Newark, New Jersey, on January 6, 1965, and having been found qualified for Military Service, did knowingly, wilfully and unlawfully fail to submit himself for induction into said Military Training and Service in violation of 50 U.S.C. App. §462.

Defendant pleaded not guilty to the indictment and, represented by competent counsel, went to trial thereunder before the court without a jury; having duly waived a jury trial by compliance with the requirements of F.R.Cr.P., Rule 23(a), 18 U.S.C.A.

Pursuant to Rule 23 (c) and the requests of the defendant, I find specially from the evidence the following facts.

At all relevant times defendant has been a citizen of the United States and resident in this District. He was born on December 6, 1939 and registered with Local Board No. 4 for New Jersey of the Selective Service System at Hackensack in this District. Registrant completed and returned to the local board a Classification Questionnaire, and upon the information therein disclosed, as supplemented by a letter on October 19, 1961, verifying his attendance as a student at the University of Chicago, Illinois, registrant was granted student deferment by the board on November 15, 1961, and was classified II-S for the 1961-1962 school term.

On August 31, 1962, as a result of appropriate physical and other examinations registrant was found physically, mentally and morally qualified for military service.

On November 13, 1962, by letter of that date to the Local Board, registrant requested and obtained a form for his use as a Conscientious Objector, which he completed and returned to the Board.

Upon the basis of information contained in his Conscientious Objector Form, registrant was classified by the Local Board on December 11, 1962 as I-A-O by reason of being opposed to combat service. From this classification registrant appealed to the Appeal Board, and during the pendency of his appeal registrant transmitted to the Appeal Board copies of certain published writings of the registrant. Also during the pendency of the appeal the Department of Justice of the United States recommended to the Appeal Board that registrant be classified I-A. The decision of the Appeal Board adopting this classification was by a vote of 3 to 0. Registrant received written notice of this classification dated December 15, 1964, and said notice was admitted in evidence as an exhibit in behalf of the defendant.

On December 21, 1964 registrant was ordered by the Local Board to report for induction into the Armed Forces of the United States at the office of the Local Board No. 4, 20 Banta Place, Hackensack, New Jersey on January 6, 1965 at 6:30 A.M.

By letter dated December 24, 1964 to the Local Board registrant requested a student deferment to permit his attendance at Fairleigh-Dickinson University, Teaneck, New Jersey. This request was denied by the board on December 28, 1964.

On December 29, 1964 registrant by letter requested of the State Director a temporary cancellation of the Local Board's order for induction. On January 4, 1965 the State Director advised Registrant that his requested intercession was unwarranted.

On January 5, 1965 registrant advised the Local Board by letter that if he were found qualified for induction upon the day following, he would refuse induction. On January 6, 1965 registrant reported at the Army Induction Station in the City of Newark, New Jersey and there refused to take the oath and to accept induction into the Armed Forces of the United States and on that occasion signed a written statement reiterating his refusal to be inducted.

Registrant further informed the appropriate officer of the Army Induction Station in writing on the date of his refusal to be inducted as follows: "I am a religious pacifist; I believe that to serve in the Armed Forces of the United States would be giving assent to the military policy of the United States Government, which I consider immoral. The military policy of the United States, as publicly stated by officers of the United States Government, includes a conditional willingness to directly attack civilians by the nuclear bombing of centers of population; the Roman Catholic Church, of which I am a member, specifically prohibits such action. Therefore, I am morally bound to refuse to serve in any organization whose mission is the execution of these immoral policies."

Defendant, testifying in his own behalf, readily admitted that he had refused to submit to induction and that he had signed a statement at the Induction Center containing such a refusal. At the age of 18, he registered with his Local Board and received a Classification Questionnaire which he completed and returned to the board. He did not claim

to be a Conscientious Objector at that time but in the Fall of 1962 after reading books by theologians, meditating thereon, and obtaining spiritual advice, he came to the conclusion that he was conscientiously opposed to war. He thereupon obtained a form of Conscientious Objector Questionnaire in which he elaborated upon the basis for his position. He testified that he was a member of the Roman Catholic Church which has a traditional teaching originating with St. Augustine, developed by St. Thomas Aquinas and discussed and published by later Doctors of the Church having to do with the circumstances under which a Christian may participate in war. Registrant claimed that his readings in the field of Ethics disclosed seven requirements for simultaneous verification before a war may be considered just and as such appropriate for participation therein by a Christian. Defendant enumerated these requirements as follows: The war must be a last resort when all other means of settling the dispute have failed. It must be declared and conducted by legitimate authorities, there must be a reasonable assurance of its successful outcome, there must be a just cause for the war and there must be a proportionality in which the good effects outweigh the evil, only the use of legitimate means of warfare may be permitted and there must be a right intention on the part of those responsible for conducting the war, i.e., the will to peace. Defendant further testified that certain activities render a war unjust and, therefore, unsuitable for Christian participation. Among such activities are direct attacks upon civilians, the employment of nuclear weapons, area bombing, bombardments of cities and the sacking of villages. Defendant claimed that his expressed views and opinions were taken from the tradition of the Roman Catholic Church, including "• • • Dogma, which is the

proclaimed teachings [sic] pronounced by a Pope or Council, and the doctrine of the traditional teaching of the Church which is passed down generation to generation, discussed by the Theologians but never officially promulgated in an official statement of Pope or Council." Defendant admitted that the Church rarely took a position on war and that the officials of the Church in each of two combatant nations supported the cause of the nation to which they belonged. Accordingly, said defendant, the individual is relegated to his own conscience. He further testified that there had never been a just war throughout history and that it was unlikely that any future war would be just. At great length the defendant reviewed the history of the Roman Catholic Church and the official pronouncements of the hierarchy thereof respecting war and the use of weapons therein. The defendant appeared on four occasions before his Local Board; the last occasion being that upon which he refused to submit to induction into the Armed Forces. The first three of those appearances were prior to defendant's assertion of the claim that he was a Conscientious Objector. He testified that he was never informed that there was an advisor for registrants or that there was an appeal agent available to him, and the notice of his final I-A Classification did not disclose that he could obtain the assistance of a Government appeal agent or advisor.

Defendant's cross examination disclosed that he had received his education in private Catholic schools, the latest of which was a military high school, in which he spent four years, participating in whatever military activities were offered. After graduating from high school he attended the University of Chicago intermittently during the period from 1957 to 1964. At the time of the trial, he was a student at Fairleigh-Dickinson University. Defendant

was initially classified by Selective Service on February 11, 1958 as I-A. On November 15, 1961 he was given a II-S Classification. His enrollment in the University of Chicago terminated February 26, 1962, and on March 13, 1962 he was classified I-A. In April of 1962 defendant took a qualifying examination for the United States Air Force, and in July or August of the same year applied for enlistment in the Naval Air Reserve. On August 31, 1962 he was physically examined for induction into the military service and found acceptable for I-A Classification. It was not until October or November, 1962, while he was working in the National Office of the Student Peace Union in Chicago that he read a book by a Trappist Monk followed by another book on the basic Ethics of War which induced his mind to explore the doctrine of a just war. This reading led him to apply to his Local Board for a classification as Conscientious Objector and he filed Form No. 150 on November 15, 1962 to that end. The statements which he made therein incorporate the views and reasons the defendant has advanced before me and to which I have already alluded.

Pursuant to his application as a Conscientious Objector the defendant was classified I-A-O by his Local Board. This classification would have allowed him to perform noncombatant service in the Army and induced him to appeal for the classification of I-O. He was thereafter investigated by the Department of Justice and given a hearing in August 1964, in the City of Newark, New Jersey. At that hearing he presented witnesses in support of his position. Although the defendant had claimed in Form No. 150 a classification of Conscientious Objector, he maintained before the hearing official in August 1964, that there had never been a just war in history and that there never could

be. He based this opinion upon his own judgment informed by the teachings of the Church. The defendant further stated to the hearing official that he would have no objection to the use of conventional weapons against soldiers nor to being in the Armed Forces of the United States if equipped only with guns that fired bullets, provided that the Government's military policy prohibited the bombing of cities having no military value.

Defendant admitted that on January 6, 1965 at the Armed Forces Induction Station in the City of Newark when he refused to submit to induction, he was fully aware of what he was doing and of the penalties provided for guilt of that refusal. His stated reason for such refusal was the dictate of his conscience.

The evidence disclosed beyond a reasonable doubt that the defendant Stephen Spiro was properly classified by the appropriate Selective Service Authorities as I-A for Military Service in the Armed Forces of the United States. The evidence further disclosed beyond a reasonable doubt that defendant was accorded due process of law in his proceedings before the Local Board and before the Appeal Board. The evidence further disclosed beyond a reasonable doubt that the defendant having been duly classified for Military Service in the Armed Forces of the United States as I-A, having been found physically, mentally and morally fitted to participate in combat in the Armed Forces of the United States, and having been ordered to report for induction into said Armed Forces on January 6, 1965 at Newark, New Jersey, did knowingly, wilfully and unlawfully refuse to submit to such induction in violation of the provisions of 50 U.S.C. App. §462. Therefore, I find the defendant guilty as charged in the indictment.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

APPENDIX C

Opinion of the Court

(Filed August 29, 1967)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16073

UNITED STATES OF AMERICA

—v.—

STEPHEN SPIRO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued June 5, 1967

Before:

STALEY, *Chief Judge*, KALODNER, *Circuit Judge*,
and SHERIDAN, *District Judge*.

By STALEY, *Chief Judge*.

This appeal is from a conviction under an indictment charging a violation of 50 U.S.C. App. § 462 (1964). Defendant, Stephen Spiro, was classified I-A by his local

draft board and at his trial he challenged the validity of this classification, contending that he should have been classified as a conscientious objector. The district judge, sitting without a jury, found that appellant, a Roman Catholic, was properly classified by the appropriate Selective Service authorities as I-A. He further found that appellant was accorded due process before the local board and the appeal board. The same issues that were raised in the district court are raised here.

Appellant claims that the granting of conscientious objector status to Jehovah Witnesses who will fight only in a theocratic war and the denial of such status to a Catholic who will fight only in a "just war" violates his federally protected right to religious freedom and equal protection of the law. Both the Selective Service authorities and the district court found that appellant did not meet the statutory test for granting of conscientious objector status. See 50 U.S.C. App. § 456(j) (1964). We have authority to reverse only if there has been a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. Estep v. United States, 327 U.S. 114 (1946); United States v. Sturgis, 342 F.2d 328, 331 (C.A.3), cert. den., 382 U.S. 879 (1965); Blalock v. United States, 247 F.2d 615, 619 (C.A.4, 1957).

After thoroughly reviewing the record we can only conclude that appellant's classification did have a factual basis. Once this conclusion is reached, we are without jurisdiction to delve into the legal and theological implications of appellant's beliefs. We do have jurisdiction, however, and we deem it necessary, to review the procedures followed by appellant's local board in order to determine whether he was afforded due process.

Appellant contends that he was denied due process under 32 C.F.R. §§ 1626.41,[1] 1626.61(b),[2] and 1627.8[3] (1962) when the local board failed: (1) to notify him that a Government appeal agent was available to advise him, (2) to apprise him that the Government agent had ten days within which to request reconsideration by the appeal board or to request a Presidential appeal, and (3) to wait ten days after sending the notice of classification, before issuing an induction order.

Assuming, arguendo, that the local board did violate one or more Selective Service Regulations, before we can set aside the conviction it must also appear that appellant was prejudiced by the alleged violations. United States ex rel. Lipsitz v. Perez, 372 F.2d 468 (C.A.4, 1967); United States v. Sturgis, 342 F.2d 328 (C.A.3, 1965), cert. den., 382 U.S. 879 (1965); United States v. Lawson, 337 F.2d 800 (C.A.3, 1964), cert. den., 380 U.S. 919 (1965). It is urged that the Government should bear the burden of showing that no harm occurred. Steele v. United States, 240 F.2d 142 (C.A.1, 1956). But this Circuit stated in

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[1] See note 5 *infra*.

[2] The relevant portions of 32 C.F.R. § 1626.61(b) (1962) are set out on page 14a of the text *infra*.

[3] Section 1627.8 of the Selective Service Regulations provides:

"The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the President or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the President has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board." 32 C.F.R. § 1627.8 (1962).

United States v. Sturgis, "it seems the better view that the person asserting it, here the appellant, should have the burden of proving prejudice." 342 F.2d at 331. Accord, Bradshaw v. United States, 242 F.2d 180 (C.A.10, 1957); Rowton v. United States, 229 F.2d 421 (C.A.6), cert. den., 351 U.S. 930 (1956); United States v. Manns, 135 F. Supp. 624 (N.D. Ill. 1955), aff'd, 232 F.2d 709 (C.A.7, 1956).

Although appellant has failed to demonstrate that he was prejudiced because of the alleged failure of the local board to comply with Selective Service Regulations, we have independently examined the record because of the seriousness of the question involved. Our examination discloses no prejudice to appellant. Selective Service Regulation 1604.41 (32 C.F.R. § 1604.41 (1962)) requires conspicuous posting in the local board office of the names and addresses of advisors to registrants within the local board area.[4] At appellant's trial the chief clerk of the local board testified that the names of both the government appeal agent and the advisors to registrants were posted on the bulletin board in the office of the local board. Appellant also testified that on the day of his induction he noticed the names of these individuals on the bulletin board.

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[4] Section 1604.41 of the Selective Service Regulations states:

"Advisors to registrants may be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office." 32 C.F.R. § 1604.41 (1962).

Selective Service Regulation 1626.61(b) (32 C.F.R. § 1626.61(b) (1962)) provides in part:

> "At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification * * *, or at any time before the registrant is mailed an Order to Report for Induction, * * * the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. * * *"

Appellant claims that the mailing of the order to report for induction within six days of the mailing of the notice of classification reduced the time in which the government appeal agent could have acted in his behalf from ten days to six days. We do not agree. Appellant's notice of classification was mailed on December 15, 1964, but he was not ordered to report for induction until January 6, 1965, some 22 days later. We see no reason why the mailing of the notice of induction would have precluded the government appeal agent from entertaining a request by appellant during the remaining four-day period. Nor do we see any merit in appellant's contention that 32 C.F.R. § 1626.41 (1962) renders the induction order ineffective.[5]

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[5] Selective Service Regulation 1626.41 provides:

> "The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods

Section 1626.41 applies only during the period when a registrant may appeal his classification or during the period when such an appeal is pending. It noticeably omits all reference to the time period applicable in § 1626.61(b) (the time in which a government appeal agent may act on behalf of a registrant).

As mentioned above, even if we assume that appellant's local board failed to comply with one or more Selective Service Regulations, we do not see how such failure could have been prejudicial. Appellant had been classified I-A by the local board, he appealed, had a hearing before a Hearing Officer, and was investigated by the Conscientious Objector Section of the Department of Justice. At all these levels of the Selective Service System, the same decision was reached. Appellant has not shown, nor are we persuaded by our examination of the record, that intervention of the government appeal agent would have evoked any other classification.

The judgment of the district court, therefore, will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board." 32 C.F.R. § 1626.41 (1962).

APPENDIX D

Order Amending Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16073

UNITED STATES OF AMERICA

—v.—

STEPHEN SPIRO,

Appellant.

Present:

STALEY, *Chief Judge,* KALODNER, *Circuit Judge,*
and SHERIDAN, *District Judge.*

The opinion of this court filed August 29, 1967, in this case is hereby amended by striking out on page 5, line 4 of the first full paragraph the following language: "Appellant had been classified I-A by the local board, he appealed, had a hearing before a Hearing Officer, and was investigated by the Conscientious Objector Section of the Department of Justice. At all these levels of the Selective Service System, the same decision was reached," and inserting in lieu thereof the following language: "Appellant had initially been classified 1-A-0 by his local board. He appealed to the Selective Service Appeal Board seeking a 1-0 classifi-

cation. He had a hearing before a Hearing Officer, and was investigated by the Conscientious Objector Section of the Department of Justice. At all appellate levels of the Selective Service System, the same decision was reached. The Hearing Officer, the Justice Department, and the Appeal Board were of unanimous agreement that appellant did not meet the statutory exemption set forth in 50 U.S.C. App. § 456(j) (1964), in that he had not demonstrated a conscientious objection to participation in war in any form. By a vote of 3 to 0, the Appeal Board classified appellant 1-A. His file was returned to the local board, and he was notified of his 1-A classification."

By THE COURT,

STALEY,
Chief Judge.

Dated: October 20, 1967

APPENDIX E

Constitutional Provisions, Statutes and Regulations Pertinent Parts Involved in this Petition

Constitution of the United States:

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime . . . nor be deprived of life, liberty or property, without due process of law; . . .

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes

5 U.S.C. 1005 Ancillary Matters

Except as otherwise provided in this Chapter—

(a) Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by coun-

sel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding . . . .

28 U.S.C. 1254. Courts of Appeals; Certiorari; Appeals, Certified Questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

50 U.S.C. App. Sec. 456 (j)

(Sec. 6 (j) of the Universal Military Training and Service Act, as amended (Pub. Laws 51, 82nd Cong. approved June 19, 1951).

(j) Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title,

be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice of inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to per-

form for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If, after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

50 U.S.C. App. 460 (b)(1):

Sec. 10 (b)(1) U.M.T. & S. Act:

(b) Officials, employees, and boards; Printing; Paroles; Leases.—The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this title;

50 U.S.C. App. 462 (a):

(Sec. 12 (a) U.M.T. & S. Act)

Sec. 12. Penalties: (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions

of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so on any way, by force or violence or otherwise, with the administration of this title, or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried

by court martial, and, on conviction shall suffer such punishment as a court martial may direct . . .

50 U.S.C. App. 463 (b):

Sec. 13 (b) U.M.T. & S. Act

Sec. 13 (b) All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act.

Selective Service Regulations:

ADVISORS TO REGISTRANTS

32 C.F.R. Sec. 1604.41: Appointment and Duties: Advisors to registrants may be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

GOVERNMENT APPEAL AGENTS

32 C.F.R. Sec. 1604.71: Appointment and Duties: (a) For each local board a government appeal agent shall be appointed by the President upon recommendation of the Governor.

(b) . . .

(c) Each government appeal agent and associate government appeal agent shall, whenever possible, be a person with legal training and experience and shall not be a member of the armed forces or any reserve component thereof.

(d) It shall be the duty of the government appeal agent and in his absence or inability to act or at his direction, the duty of the associate government appeal agent:

(1) To appeal, as prescribed by the regulations in this chapter, from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.

(2) . . .

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered.

(4) . . .

(5) To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.

32 C.F.R. Part 1624—

APPEARANCE BEFORE LOCAL BOARD

1624.1 (b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant:

Provided, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

Reconsideration By Appeal Board

32 C.F.R. Sec. 1626.61 (b): At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (SSS Form No. 110) as provided in section 1626.31, or at any time before the registrant is mailed an Order to Report for Induction (SSS Form No. 252) the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. The registrant's file shall then be forwarded to the State Director of Selective Service. As soon as the State Director of Selective Service has acted upon the recommendation of the government appeal agent he shall advise the local board and, if he determines neither to request the appeal board to reconsider its determination nor to appeal to the President, he shall return the file to the local board.

APPENDIX F

Letter from Chief of the Conscientious-Objector Section, T. Oscar Smith, to New Jersey Appeal Board

Sep. 4, 1964

Chairman, Appeal Board
Panel No. 1, State of New Jersey
Selective Service System
1006 Broad Street
Newark 2, New Jersey

Re: Stephen Spiro
Conscientious Objector

Dear Sir:

As required by Section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the captioned matter and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. William P. Reiss, a Hearing Officer for the Department of Justice.

The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resume of the Inquiry attached hereto and made a part hereof.

Registrant was born in New York City on December 6, 1939. His mother is a Roman Catholic and the registrant was baptized in that faith as an infant. He graduated from Xavier High School in New York City in June 1957, ranking

68 in a class of 201 and thereafter attended the University of Chicago, Chicago, Illinois, and was placed on probation during the academic year 1961-62 because of below-average grades. He also attended Fairleigh Dickinson University, Teaneck, New Jersey, for one semester, leaving in May 1960 with three credits of work in a liberal arts curriculum. His SSS Form 100, received by his local board in January 1958, made no claim of conscientious objection, and following a physical examination, was found acceptable for service on August 31, 1962. His SSS Form 150, received by his local board on November 26, 1962, claimed conscientious objection as to combatant and noncombatant military training and service. His local board successively classified him I-A, II-S, I-A, and, finally, I-A-O on December 11, 1962 and he appealed. The appeal board tentatively determined that he should not be classified in Class I-O or in a lower class.

Annexed hereto and made a part hereof are Exhibits A through U submitted to the Department of Justice in behalf of the registrant.

Registrant appeared before the Hearing Officer at Newark, New Jersey on August 18, 1964, accompanied by his mother and an associate director of the Catholic Worker who is also a member of the Central Committee of Conscientious Objectors and a member of American PAX Association. The registrant told the Hearing Officer that his leaving the University of Chicago was due to financial difficulties and also due to the fact that his marks were not satisfactory and that he was not able to adapt himself to the freedom of the university in contrast to the disciplinary regimen of the military Catholic high school which he had previously attended. He stated that termination of his services as a carrier at the Hackensack Post Office was due to an unfamiliarity with the area, to his being ill

with the German measles, to blisters on his feet, and to an upset stomach. He stated that his later work at the Woodlawn Hospital in Chicago made it difficult to carry on his college work satisfactorily. He said he took a qualifying examination for the Air Force in April 1962 and in July and August 1962, was pre-processed for the Naval Air Reserve. He said that he joined the Student Peace Union in Chicago in August 1962 and that it was in September or October 1962 that he decided that he was a conscientious objector and began reading intensively on moral theology, particularly relating to war and nuclear arms, and, although he claimed conscientious objection in November 1962, he did not request a hearing before the local board. He was readmitted to the University of Chicago in the fall of 1963, terminating his work at the hospital in November 1963 and he left the university at the end of December 1963 with a disqualification for further studies because of poor grades. He remained in Chicago in January and February 1964, participating in Student Peace Union activities and since returning to the home of his parents in Bogota, New Jersey in February 1964, he has been employed as a margin clerk in a brokerage house in New York City.

Questioned by the Hearing Officer as to why he did not claim conscientious objection until after he had taken his physical examination, he stated that he did not acquire his conscientious objection until September or October 1962 and until then, he was willing to serve in the Armed Forces. He told the Hearing Officer that the basis of his conscientious-objector view is the Catholic doctrine that a nation engaged in warfare is morally correct only if it is engaged in a just war and that he believes that he cannot, in good conscience, support this country in a war that is not a

just war judged by Thomistic criteria; that indiscriminate mass bombing of cities and civilians and the use of nuclear weapons is the use of an illegitimate means of warfare in which evil outweighs good; that the United States is inevitably committed to mass bombing of cities and civilians and any war that the United States would participate in would not be a "just war." He said that by serving in the Armed Forces he would be giving tacit assent to what he feels is the nuclear policy of this country and that even in noncombatant service he would feel that he was still a part of the military establishment. Registrant's mother stated that she violently disagrees with her son's views but believes that he is sincere in his views. The associate editor of the Catholic Worker expressed his view that the registrant's position is a tenable one.

The Hearing Officer reported that the registrant frankly admitted that he could not in good conscience object to participation in a "just war"; that he also admitted that his belief that the next war would be an unjust war is a matter of opinion; that he admitted that there is no officially stated Catholic Church opinion against war; that he admitted the presence of Catholic chaplains in the Armed Forces; that he admitted that his position was based on a political analysis of warfare from an historical as well as current point of view; that he admitted that he had no objection to the use of conventional or nuclear weapons against soldiers and would have no objection to being in the Armed Forces of the United States equipped only with guns that shot bullets provided military policy prohibited the bombing of cities having no military value.

The Hearing Officer found that the registrant is a sincere and devout member of the Catholic Church and is sincere in his adherence to his views notwithstanding that he came

late to his conscientious-objector position but that the registrant does not have a conscientious objection to participation in war in any form; that there is no basis for distinction between combatant and noncombatant service as far as the registrant is concerned and that he has not met the terms of the statutory exemption in the Universal Military Training and Service Act. The Hearing Officer recommended that the conscientious-objector claim of the registrant be not sustained.

Exemption from military service under the Universal Military Training and Service Act, as amended, is given only to that registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. The words, "in any form" relate not to war but to participation in war. *Taffs* v. *United States,* 208 F. 2d 329, *certiorari denied,* 347 U.S. 928. The registrant, by his own admission, is willing to engage even in a combatant capacity in a war with limitations he himself prescribes. It is believed that the registrant has failed to place his conscientious objection within the scope of the statutory exemption of the Act.

The Department of Justice concurs in the Hearing Officer's determination and recommends to your board that the conscientious-objector claim of the registrant be not sustained and that he be not classified in Class I-O or in Class I-A-O.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,

T. Oscar Smith
Chief,
Conscientious-Objector Section

APPENDIX G

Letter from Petitioner to New Jersey Appeal Board

64 Pine Street
Bogota, New Jersey 07603
12 October 1964

Appeal Board
Panel No. 1, State of New Jersey
Selective Service System

Gentlemen,

I have already submitted a great deal of information explaining my position several times over. I will not bore you by going over everything again, but will refer only to relevant points.

Since the Hearing Officer has accepted the sincerity of my position, "notwithstanding that (I) came late to (my) conscientious-objector position", I assume that you are most concerned with justifying my position under the law.

I hold that, as presently publicly stated, the military policy of the United States involves a conditional willingness to engage in a war which is not "just" according to the teachings of my Church. Since participation in military service would indicate *at least* a tacit acceptance of this policy, I am morally bound in conscience to remain outside the military structure.

Moreover, even if the United States were to publicly renounce those parts of its policy which I consider evil, a reasonable man must assume that, given the exigencies of

war, nuclear weapons or other immoral practises would be utilized if the national leadership considered them necessary to avoid defeat. History is filled with wars which began with the noblest of intentions, but which degenerated into evil practises. The very fact of the existence of a nuclear potential rules out the possibility of assurance of a just war. The same thing was said of the invention of gunpowder, and in fact I agree with that as well. I can find no example of war since the invention of gunpowder of which I can say it began, was conducted, and ended justly. For that matter, nor can I find an example of war *before* the invention of gunpowder which met all the criteria of the teachings of my Church.

The report of the Department of Justice comments that "he also admitted that his belief that the next war would be an unjust war is a matter of opinion." The hearing officer did indeed ask me if I agreed with him that my belief in the unjustness of the next war was an opinion, and I did agree with him. However, upon reflecting on that statement, I feel that "opinion" is not quite the correct word. I think that my belief in the unjustness of the next war would more appropriately be called a "judgment", that is, an analysis or interpretation which forms the basis for action. In seeking guidance for the determination of such a judgment, I look first to the Church. The Church, as the Church, has no official position on the application of its teachings to possible future political events. On the other hand, many theologians agree with my position, and I have in fact based my position in large measure upon the statements of these theologians. On the other hand, the presence of many priests in the armed forces indicates that there is by no means any unanimity on the question

among Churchmen. The next place to seek guidance is from the government; but in this case, such a quest is futile—no government, no civil authority would admit to an unjust war, even if in fact it were intending to wage one such wilfully. Therefore, I am forced to rely on my own conscience, which the Church teaches must always be our ultimate and final guide. My conscience has formed a judgment, which I must accept and follow.

Although I said that I could participate in a just war, even in a combatant status, this was purely a theoretical statement. If I had wings I could fly. I maintain that this "just" war is, in the real world, not capable of occurring; that as a result of the Sin of Adam and the consequent Corruption of the Human Will, it is inconceivable that a just war will ever happen—since there never has been one, as far as I can tell, and I hardly expect that Men will suddenly change. Consequently, I must refuse military service.

In summary, my position is based on an application of the teachings of my Church as I see them applied to the military policies of this country, which I consequently must consider immoral and worthy of condemnation; and my belief that a Just War is impossible, given current technology and the imperfection of the Human Race as Sons of Adam.

Thank you for your consideration.

In Peace through Christ,

/s/ Stephen Spiro
Stephen Spiro

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289-107—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 874

STEPHEN SPIRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C and D) is not yet reported. The opinion and findings of fact of the district court (Pet. App. A and B) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1967. A petition for a rehearing was denied on October 20, 1967. The time for filing a petition for a writ of certiorari was extended to and including December 4, 1967, by Mr. Justice Brennan, and the petition was filed on December 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly denied conscientious objector status and given a I–A Selective Service classification in view of his adherence to the "just war" doctrine allegedly found in certain writings of persons associated with the Roman Catholic Church.

2. Whether petitioner was denied procedural due process incident to his classification as I–A.

STATUTES AND REGULATIONS INVOLVED

Sections 6(j) (50 U.S.C. App. 456(j)) and 12(a) (50 U.S.C. App. 462(a)) of the Universal Military Training and Service Act, 62 Stat. 604 *et seq.*, as amended, and pertinent regulations of the Selective Service System are contained in Appendix E to the petition (pp. 19a–25a).

STATEMENT

Petitioner, having waived a jury, was convicted in the United States District Court for the District of New Jersey for failing to submit to induction in the Armed Forces of the United States in violation of 50 U.S.C. App. 462(a) (A. App. 85a–95a).[1] He was sentenced to imprisonment for a period of two years (A. App. 97a). The court of appeals affirmed (Pet. App. C and D, 10a–17a).

Petitioner, a practicing Roman Catholic, registered with his local Selective Service Board, located in Hackensack, New Jersey, in January 1958. He did

[1] The record filed with the Clerk of this Court consists of Appellant's Appendix (A. App.) and Supplemental Appendix (S. App.) and the Government's Appendix (G. App.) in the court of appeals.

not then claim conscientious objection to participation in war in any form (A. App. 7a, 33a–34a; G. App. 2), and was classified I–A (A. App. 52a). In the fall of 1957, petitioner had commenced an on-and-off course of study at the University of Chicago (A. App. 50a–53a; G. App. 3–7). It was not until October 1961 that his Local Board was notified of his student status; he was then reclassified II–S (student) for the 1961-1962 school term—his senior year (A. App. 8a, 52a; G. App. 6). Petitioner dropped out of school in January 1962 and his Local Board was so notified in February 1962 by the university (A. App. 52a–53a; G. App. 6–7). Petitioner visited his Local Board on March 13, 1962, to inquire concerning the possibility of his being inducted (G. App. 7). On that same day he was reclassified I–A (A. App. 53a; G. App. 7). In April 1962, petitioner took the qualification examination for the United States Air Force (A. App. 54a; G. App. 7). On June 7, 1962, petitioner's Local Board mailed him directions to report for his Armed Forces physical examination on July 26, 1962 (G. App. 7). At his request, this was delayed and the place of examination was shifted to Chicago, where petitioner was then living (G. App. 7). During July or August 1962, petitioner filled out an application and was pre-processed for the Naval Air Reserve at the Glenview Naval Air Station in Illinois, the papers to be held until it was determined whether he would return to school in the fall (A. App. 54a–55a; G. App. 7). Petitioner took his Armed Forces physical examination pursuant to the direction of his New Jersey Local Board in Chicago on August 31, 1962. He was found physically

qualified for induction into the Armed Forces (A. App. 53a–55a; G. App. 7–8).

In August 1962, petitioner joined the Student Peace Union in Chicago (A. App. 55a; G. App. 8). In the course of his activities with that organization he reviewed a book which introduced him to certain Catholic thought on the doctrine of "just" and "unjust" wars, opening up "new areas of thought which I never realized existed" (A. App. 55a, 74a). Further research in the fall of 1962 crystallized petitioner's acceptance of the "just war" theory and, on November 13, 1962, he wrote his Local Board requesting the special form for conscientious objectors (A. App. 9a, 55a–56a; G. App. 8). Petitioner completed the form, with enclosures elaborating on the just war doctrine and his application of it to current military policy of the United States (particularly in regard to nuclear war), and mailed them to the board (A. App. 9a, 56a–57a; S. App. 1a–8a; G. App. 8). As a result, the Local Board classified petitioner I–A–O (exempt from combatant duties) on December 11, 1962 (A. App. 9a–10a, 57a). Since he had asked for a I–O classification (exempt from all military service), petitioner appealed to the State Selective Service Appeal Board (A. App. 10a, 57a). Petitioner's selective service file was forwarded to the Appeal Board and, in due course, referred to the Department of Justice for inquiry, hearing and recommendation under the provisions of Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)).

At the hearing on August 18, 1964, petitioner, supported by articles and statements by himself and others, testified concerning his concept of the just war

doctrine and the limitations religiously imposed thereby upon him (G. App. 1–23). Essentially, petitioner accepted the view taught by some Catholic theologians dating back to the period of St. Augustine [2] that Christians can participate as combatants only in a "just" war as defined and delineated by some six or seven characteristics as follows (A. App. 35a–36a; S. App. 1a, 17a–18a): (1) the cause of the war must be just; (2) the war must be declared and conducted by legitimate authority; (3) the war must be the last resort, when all other means of settling the dispute have failed; (4) there must be a reasonable assurance of a successful outcome; (5) there must be a "right intention" on the part of those responsible for declaring and conducting the war; (6) there must be a proportionality in which the good effects outweigh the evil; and (7) only legitimate means of warfare may be used, particularly in regard to direct attacks upon civilians.

From the documents and testimony, the hearing officer found that petitioner's basic position in applying the just war criteria was (G. App. 14–15):

> (1) that indiscriminate mass bombing of cities and civilians and the use of nuclear weapons is the use of an illegitimate means of warfare and one which will inevitably produce a proportionality in which evil outweighs good with little or no reasonable assurance of a successful outcome, (2) that the United States Government is in-

[2] It is undisputed that the just war doctrine exists in Catholic tradition, but is not an officially adopted position of the Church; nor has it ever been officially applied to a particular war (*e.g.*, A. App. 62a; G. App. 16).

> evitably committed to the use of indiscriminate mass bombing of cities and civilians and the use of nuclear weapons should it again participate in a war, and (3) therefore, any war in which the United States would participate in the future would not be a "Just War".
>
> * * * * *
>
> He believes that no future war can be a "Just War", but this belief is not a religious belief but a personal opinion or view as to the anticipated nature of the next war which he has adopted from his readings of books by Catholic theologians.

Petitioner testified that he could not in conscience object to participation in a "Just War" (A. App. 106a; G. App. 15). He further stated that he had no objection to the use of conventional or nuclear weapons against troops; no objection to the bombing of factories even though it may cause incidental deaths of civilians in the area; no objection to the taking of life; no objection to serving as a soldier if the troops were armed with guns that shot only bullets, so long as military policy precluded the use of morally illegitimate weapons of warfare and indiscriminate bombings of cities having no military value (A. App. 107a; G. App. 17, 19).

The hearing officer concluded that petitioner's minor premise—that the United States was inevitably committed to indiscriminate mass bombing of civilians and use of nuclear weapons—was not a religious belief based on fact but was essentially a historical prediction of a political nature, stating (G. App. 15):

> It is not a fact; rather, it is a prediction.

> Neither Registrant nor the heads of the military and political establishments of this country can predict how the United States will fight its next major war. Nor can it now be determined on any basis that the facts and circumstances at the time of a next major war will be such that any particular mode of conducting the war can be *a priori* classified as morally illegitimate. This is so because moral judgments are dependent upon the circumstances in which conduct is undertaken and the intention of the actor at the time the action is taken.

The hearing officer, while concluding that petitioner was sincere in his adherence to the just war doctrine (G. App. 21), found that he had not demonstrated a conscientious objection to participation in war in any form, the standard prescribed by 50 U.S.C. App. 456 (j) (G. App. 22). Accordingly, he recommended that petitioner be classified I–A.

Based on the report of the hearing officer, the Department of Justice recommended to the State Appeal Board that petitioner be classified I–A (A. App. 103a–108a). The three-member Appeal Board did so by a unanimous vote (A. App. 13a–14a). On December 21, 1964, petitioner was mailed orders to report for induction into the Armed Forces of the United States on January 6, 1965 (A. App. 14a–15a). On January 6, 1965, petitioner reported to the induction station but refused to submit to induction (A. App. 18a, 68a–69a; G. App. 33–39).

ARGUMENT

1. Contrary to petitioner's assertion (Pet. 12–16), there is no conflict between the instant case and this

Court's decision in *Sicurella* v. *United States,* 348 U.S. 385, giving rise to an arbitrary discrimination between Catholic and other classes of conscientious objectors. The statute applies equally to exempt from military service all persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form (50 U.S.C. App. 456(j)). Petitioner is admittedly not conscientiously opposed to either combatant or non-combatant participation in wars which meet the criteria he delineated in his concept of a "just war" (see *supra,* p. 6). Unlike the petitioner in *Sicurella,* who unequivocally objected to participation in all carnal warfare and all use of carnal weapons, the instant petitioner's "just war" precisely fits the actual shooting wars "that Congress had in mind * * * when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets" (*Sicurella* v. *United States,* 348 U.S. at 391).

To meet the congressional prescription, the objection must be a general scruple, religiously founded, *against participation in war in any form* and not merely an objection to participation in a particular kind of war. See *United States* v. *Kauten,* 133 F. 2d 703 (C.A. 2); *United States* v. *Kurki,* 255 F. Supp. 161, 165 (E.D. Wis.), affirmed, 384 F. 2d 905 (C.A. 7), certiorari denied, January 29, 1968, No. 641 Misc., this Term. Petitioner's asserted conclusion that it is inconceivable that a "just war" will ever happen—based on his view of the history of warfare, present military policy of the United States, current technology and

the imperfections of humanity (Pet. 13; see Pet. App. 33a)—does not militate against the hearing officer's finding, grounded on ample evidence, that this view was not of religious origin, but was an opinion or judgment based on petitioner's personal analysis of warfare from an historical as well as a contemporary point of view (A. App. 107a; G. App. 15–16, 19, 21–22).

It is our view that Congress never intended to exempt from military service one whose conscientious objection to an actual or potential war depends upon the individual's application of his own judgment to present or predicted policy, existing authority, motives of participants or analysis of historical and political events surrounding carnal warfare. Congress sought to recognize, as it has recognized since the inception of this country, general religious objections to participation in war based on inherent characteristics of military combat, for example, a religious scruple against application of violent force to others or a belief that it is wrong to kill. We think it clear that Congress could validly exclude one who professes to oppose only "unjust" wars, and whose personal view is that all future wars are likely to fit into that category, from the pertinent exemption provisions of the Selective Service Act.[3] A fair reading of the statutory language, we submit, shows that Congress fully in-

[3] Exemptions from military service rest upon the grace of the government and not upon constitutional right. *E.g.*, *United States* v. *Macintosh*, 283 U.S. 605, 623; *Fleming* v. *United States*, 344 F. 2d 912, 915 (C.A. 10); *Clark* v. *United States*, 236 F. 2d 13, 23 (C.A. 9), certiorari denied, 352 U.S. 882.

tended to do so "when it said the thrust of conscientious objection must go to 'participation in war in any form.' " *Sicurella* v. *United States,* 348 U.S. at 390; see also *United States* v. *Hartman,* 209 F. 2d 366, 370–371 (C.A. 2); *Taffs* v. *United States,* 208 F. 2d 329, 331 (C.A. 8), certiorari denied, 347 U.S. 928. Nothing in *United States* v. *Seeger,* 380 U.S. 163, is to the contrary, for there the individuals represented that they were opposed "to participation in war in any form" (*id.* at 165), and the question involved was whether their opposition was sufficiently grounded on religious considerations.

Here the Selective Service Appeal Board's determination that petitioner was not conscientiously opposed to participation in war in any form cannot be overturned unless there is no basis in fact for that conclusion. *E.g., Witmer* v. *United States,* 348 U.S. 375, 380–381; *Dickinson* v. *United States,* 346 U.S. 389, 396; *Estep* v. *United States,* 327 U.S. 114. Petitioner's frank admission that he can in good conscience participate in a just, carnal war (see *supra,* p. 6) makes further review by this Court unwarranted.[4]

2. There is no merit in petitioner's claim (Pet. 16–18) that he was denied procedural due process. Petitioner complains that he was not directly notified of the existence of government appeal agents with authority under 32 C.F.R. 1626.61(b) to recommend

[4] It is not true, as petitioner seeks to suggest, that no practicing Catholic could be deemed to be a sincere conscientious objector. The record for the period of World War II, 1940–1947, for which statistics are available, shows that those given conscientious objector status included Catholics. See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, p. 318 (1950).

to the State Selective Service Director at any time (within 10 days of the mailing of the notice of classification or at any time before receipt of the notice to report for induction) that the State Director either appeal to the President or request the Appeal Board to reconsider its determination.[5] The fact that there were such agents was not then stated in individual notices, although notice of this was posted at the board offices. However, the most that the appeal agent could have done for petitioner was to make a recommendation to the State Director who, under the regulations, can act without such recommendation "at any time." Petitioner himself brought the matter to the attention of the State Director shortly after he received his notice to report for induction, and the State Director responded that his intervention was not warranted (S. App. 46a–49a).[6] Petitioner's position had been fully spread on the record in the regular appeal and did not materially change over the two years

[5] Availability of appeal agents to advise registrants is now indicated on the "Notice of Classification" (SSS Form 110) and on a covering letter sent with such notice (SSS Form 217). If the registrant requests assistance, the local board will make an appointment with an appeal agent. The registrant is notified of such appointment on a standard form (SSS Form 218).

[6] Petitioner did not have the right of appeal to the President because the determination of the Appeal Board was unanimous. 32 C.F.R. 1627.3. The action of the government appeal agent is strictly limited to a recommendation to the State Director based on whether he deems reconsideration or appeal to be in the national interest or necessary to avoid injustice. The Director of Selective Service or the State Director may, independent of any recommendation from an appeal agent, request reconsideration by the Appeal Board or appeal to the President "at any time." See 32 C.F.R. 1626.61(a) and 1627.1(a).

involved. The hearing officer, the Chief of the Conscientious Objector Section of the Department of Justice and the Appeal Board all unanimously agreed that petitioner did not meet the statutory requirements for exemption as a conscientious objector. On this record, it is extremely remote and speculative to suggest that the appeal agent would have made a favorable recommendation, much less that the State Director would have acted on it to appeal or request reconsideration which would have resulted in a reversal of the original determination.

In any event, the system of notice used by the Local Board here was adequate to withstand attack on due process grounds. Although the regulation providing for appeal agents does not require any particular method of notice apart from the publication of the regulation itself (32 C.F.R. 1604.71), the Local Board here posted names and addresses of appeal agents conspicuously on the bulletin board in the public spaces used by registrants. This is exactly the same procedure required by regulation for giving notice of names and addresses of "advisors to registrants" appointed under 32 C.F.R. 1604.41.[7] Petitioner had visited his Local Board some three times prior to his refusal to submit to induction, and thus had ample op-

[7] In this Court, petitioner has dropped his complaint below that he was denied due process by failure to tell him about the existence of advisors to registrants, presumably because the Local Board had admittedly complied with the posting provisions of the regulation. See, *e.g.*, *United States* v. *Sturgis*, 342 F. 2d 328 (C.A. 3), certiorari denied, 382 U.S. 879; *Bradshaw* v. *United States*, 242 F. 2d 180, 184–185 (C.A. 10); *Steele* v. *United States*, 240 F. 2d 142 (C.A. 1); *Frank* v. *United States*, 236 F. 2d 39, 43 (C.A. 9).

portunity to see such notices and other information of interest to registrants which was posted there (A. App. 48a–49a). The method used was reasonably calculated to give actual notice. Moreover, petitioner's complaint of lack of knowledge of appeal agents and their powers is directed at the end of a two-year appeal process during which petitioner was an active pacifist supported by numerous persons of similar persuasion knowledgeable in selective service procedures. Indeed, petitioner was accompanied to the Department of Justice hearing by a Thomas Cornell, associate editor of the *Catholic Worker,* a member of the Central Committee of Conscientious Objectors and a member of the American PAX Association. Cornell stated at the hearing that the latter two organizations are engaged in counseling conscientious objectors and "in affording them legal and moral support" (G. App. 1–2).[8]

Petitioner's further suggestion that he was somehow prejudiced by the mailing of his induction notice only six days after mailing of his notice of classification (Pet. 3, 17–18) is without merit. The appeal agent could enter his recommendation "[a]t any time within 10 days after the date when the local board mails to the registrant a Notice of Classification * * * or at any

[8] Petitioner's intimation that regulations prevented him from seeking private legal counsel (Pet. 16–17) is unwarranted. The fact that selective service processing is considered a non-adversary process not involving right to counsel in no way prevents or discourages a registrant from seeking advice, legal or otherwise, from the Local Board, appointed advisors, appeal agents, private attorneys, or any other persons. Petitioner obviously drew on numerous sources for counsel and advice in the course of his appeal.

time before the registrant is mailed an Order to Report for Induction * * *" (32 C.F.R. 1626.61). As the court of appeals pointed out (Pet. App. 14a), the mailing of the induction notice did not under the regulations shorten the ten-day period for action by the appeal agent after notice of classification.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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